AMALGAMATED STEEL MILLS BHD.

v.

INGEBACK (M) SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[CIVIL SUIT NO. S7-22-773-89]
8 NOVEMBER 1989

CONTRACT: *Specific performance of three agreements for the sale and purchase of three pieces of land - Question of illegality - Fictitious purchase price stated in letter of offer to defeat the Stamp Ordinance 1949 and also to defraud 2 third parties - Section 92 of the Evidence Act 1950 - Admissibility of parol evidence - Whether arrangements manifesting fraudulent conduct can render the transaction void - Section 24(a), (e) of the Contracts Act 1950. "Subject to signing of formal contract" - Whether these words could be taken to mean that the parties did not conclude a binding contract.*

The plaintiff's cause of action was based on three letters all dated 7 September 1989 with which the defendant was said to have offered three pieces of land for sale. The said letters of offer were written by M/s. Jones Lang Wooten as agent of the defendant. The plaintiff accepted the offers, and initial payments of earnest money were tendered, according to the terms set out in the said letters of offer. The defendant informed the plaintiff by letter that the plaintiff's agreements to purchase the said land could not be accepted and directed its agent to return the three cheques sent by the plaintiff.

The plaintiff contended that the said letters of offer constituted binding contracts and that the defendant had no right to repudiate them. The defendant on the other hand said that the purported contracts were tainted with illegality and further that the words 'subject to signing of formal contract' on the plaintiff's letter of acceptance precluded contractual obligations.

Held:

[1] The parties did conclude a binding contract. In using the formula subject to signing of a formal contract, the plaintiff merely proposed to have the terms restated in a form which would be fuller and more precise, but not different in form.

[2] The plaintiff was at the material time keen to buy only 14.55 acres and not the 50 acre land.

[3] The claim of the plaintiff is for specific performance, and could not be sufficiently compensated by purely monetary compensation. Furthermore there is no suggestion that the plaintiff would not be able to compensate the defendant for any damages suffered.

[4] The temporary injunction granted by this Court on 6 October 1989 shall have no effect in respect of the land held under title HS (D) 20945 PT 8542 Mukim of Kapar District of Klang.

[5] The temporary injunction granted by this Court on 6 October 1989 shall continue to have effect on the lands held under titles HS (D) 23030 PT 11695 and HS (D) 20945 PT 8451 both in the Mukim of Kapar, District of Klang, until disposal of this suit with liberty to the defendant to apply to vary the said injunction.

[6] The plaintiff's undertaking regarding damages will still apply.

[Order accordingly.]

Cases referred to:
Foster v. Driscoll [1929] 1 KB 470
Kamini v. Birendra [1930] AIR PC 100
Tynte v. Buller [1854] 23 LJ Ch 504
Laroyd v. Braken [1894] 1 QB 114
Shaw v. Groom [1970] 2 QB 504
Foster v. Driscoll [1929] 1 KB 471
Alexander v. Rayson [1936] 1 KB 169
St. John Shipping Corporation v. Joseph Rank Ltd. [1957] 1 QB 267
Archbolds (Freightage) Ltd. v. S. Spanglett Ltd., Randall (Third Party) [1961] 1 QB 375
Miller v. Karlinski [1945] 62 TLR 85
Yango Pastoral Company Pty. Ltd. v. First Chicago Australia Ltd. [1978] 139 CLR 410
North & Ors. v. Marra Development Ltd. [1981] 37 ALR 341
Firm Patachand v. Firm, Kotrike [1975] AIR SC 1223
Patriot Pte. Ltd. v. Lam Hong Commercial Co. [1980] 1 MLJ 135
Palaniappa Chettiar v. Arunasalam Chettiar [1962] AC 294
American Cyanamid Co. v. Ethicon Ltd. [1975] AC 396
Government of Pakistan v. Seng Peng Sawmill Sdn. Bhd. [1979] 1 MLJ 219
Daiman Development Sdn. Bhd. v. Matthew Lui Chin Teck & Anor. [1981] 1 MLJ 56

Legislation referred to:
Contracts Act 1950 (Act 136), ss. 23, 24
Evidence Act 1950 (Act 56), ss. 92, 114illus.(g)
Securities Industry Act 1970 (NSW), s. 70

For the plaintiff - R.R. Sethu with S.K. Thean; M/s. C.S. Tang & Co.
For the defendant - Ong Teng Kek with Bella Loo; M/s. Paul Ong & Associates

JUDGMENT

Lim Beng Choon J:

On 2 October 1989 Amalgamated Steel Mills Berhad brought this action against Ingeback (Malaysia) Sdn. Bhd. for specific performance of three agreements for the sale and purchase of three pieces of land. The plaintiff also applied for a temporary injunction and its application was allowed on 6 October 1989 because at that time I was doubtful whether the defendant could at this late stage be allowed to contend that the said agreements were tainted with illegality. Furthermore the affidavits filed in support of the contention of the defendant was short served - it was filed and served on the morning of the hearing of the plaintiff's application. The temporary injunction was, however, made valid for fourteen days liberty for the plaintiff to apply for an extension and an application was made on 11 October 1989 to extend it until the final disposal of the suit.

The plaintiff is pegging its cause of action on three letters all dated 7 September 1989 with which the defendant is said to have offered the three pieces of land held respectively under the titles HS (D) 23030 PT 11695, HS (D) 23028 PT 11693 and HS (D) 20945 PT 8541 all of which are located in the Mukim of Kapar District of Klang. The purchase prices for the said lands said to be in the sums of RM4.7 million, RM0.9 million and RM11.8 million respectively. The said letters of offer were written by M/s. Jones Lang Wotten as agent of the defendant. The plaintiff had accepted the offers and initial payments of earnest money had been tendered on 12 September 1989 according to the terms set out in the said letters of offer. The defendant through its solicitors, however, informed the plaintiff by letter dated 15 September 1989 that it could not accept the plaintiff's agreements to purchase the said lands and directed its agent to return the three cheques sent by the plaintiff for the payments of the earnest money.

The plaintiff contended that as the said letters of offer constituted binding contracts for the sales and purchases of the respective lands mentioned therein, the defendant had no right under the law to repudiate them. The defendant on the other hand said that even assuming that the said letters of offer amounted to binding contracts (which it denied) the purported contracts were tainted with illegality; hence the Court should not extend the temporary injunction granted on 6 October 1989. I observe that the complaints of the defendant are directed only to the letter of offer dated 7 September 1989 relating to the sale and purchase of the land comprising of 50 acres held under the title HS (D) 20945 PT 8541 ("the 50 acres land"). I shall, therefore, first deal with particular letter of offer.

In support of the defendant's complaints, the property manager of the defendant company, Mohamed Dahan bin Abdul Latiff filed in two affidavits dated 6 October and 20 October 1989 respectively (encls. 5 and 10). The allegations made by Mohd. Dahan in his first affidavit insofar as they are relevant to the question of illegality may be stated briefly as follows. The purchase price for the 50 acres land actually agreed by the plaintiff and the defendant was said to be in the sum of RM14.157 million. The two parties, however, agreed that the true purchase price should not be reflected in the relevant sale and purchase agreement yet to be formulated. The purchase price of RM11.8 million mentioned in the letter of offer dated 7 September (see Exhibit "EBG3" annexed to encl. 2) was a fictitious one. The object of citing a fictitious purchase price in the said letter of offer was to defeat the Stamp Ordinance 1949 and also to defraud two third parties namely Visia Finance Berhad ("Visia") and Malaysian Dredging Corporation ("MDC") to whom the 50 acres land was encumbered. It was alleged that the combined sums claimed by Visia and MDC in respect of the encumbrances to the land exceeded the purchase price of RM14.157 million. As the representatives of the two parties were going to negotiate with Visia and MDS for a reduction of the settlement sums, it would be to advantage of the parties if the actual purchase price was not revealed. In the circumstances it was therefore contended that the offer and acceptance of the 50 acres land pursuant to the letter of offer dated 7 September 1989 was unlawful in that it was immoral and opposed to public policy. To support his allegations Mohamed Dahan produced the following documents and annexed them to his second affidavit (encl. 10) as exhibits:

(a) a letter dated 29 August 1989 by the plaintiff to M/s. Jones Lang Wotten, agent of the defendant (Exhibit "MD4") and

(b) a letter dated 6 September 1989 written by M/s. Jones Lang Wotten to the defendant (Exhibit "MD5")

Exhibit "MD4" shows that the plaintiff was at that time offering to purchase the 50 acres land at RM6.50 per sq. ft. which the deponent of the said affidavit claimed would amount to RM14.157 million for the whole 50 acres land. Exhibit "MD5" referred to the two meetings held between the representatives of the respective parties on 28 August and 4 September 1989 respectively. In the course of discussion at the said meetings, the plaintiff's representative confirmed the purchase price to be in the sum of RM14.157 million. In addition they also made the following offers or counter offers in respect of the 50 acres land:

(a) the contract for the sale and purchase of the said land was to comprise of two separate agreements.

(b) the first agreement would provide for RM12 million payable as follows:

(i) 10% on signing the agreement

(ii) 20% within 7 days of receiving the FIC and State approvals or within three months whichever was the later. The three months period was extendable to a further three months.

(iii) 20% and 50% on the 12th and 18th month respectively.

(c) the second agreement would provide for RM2.157 million payable in three tranches between the 2nd to the 4th month of the date of signing the agreement.

(d) a discount of RM500,000 was required and this discount should come off from the RM12 million agreement.

It was also implicitly alleged by the said deponent that the defendant accepted substantially the offers of the plaintiff and the final agreement arrived at by the two parties are these. The purchase price was RM14.157 million and there would be a reduction of RM200,000 in favour of the plaintiff. They also agreed that in formal sale and purchase agreement the purchase price would be shown as RM11.8 million, that is to say, RM12 million minus RM0.2 million being a discount given for the benefit of the plaintiff. There also would be a fictitious work contract which would show a sum payable to the defendant of RM2.157 million. Finally the said deponent pointed out that he himself as well as the managing director of the plaintiff, one William Cheng, had personal knowledge of the matters discussed at the two meetings as both of them took active part in the said discussions.

In answer to the aforesaid allegations, the legal manager of the plaintiff, one Ee Beng Guan, in his further affidavit affirmed on 16 October 1989 that many matters were discussed in the course of negotiations and that none of the matters could be admissible as the letters of offer of M/s. Jones Lang Wotten exhibited as “EBG1” “EBG2” and “EBG3” annexed to his affidavit in support of the plaintiff’s application for a temporary injunction constituted the final terms of “the contract and accepted by the plaintiff”. He reiterated that the true purchase price was reflected in “the agreement”, and he denied that there was any evasion of the Stamp Ordinance 1949. At any rate, so said he, an alleged breach of the said Ordinance would not render “ the agreement” void particularly when the Revenue Department would never accept the consideration stated in the agreement but would always value the property concerned independently and assess the proper amount of duty payable. As regards to the allegation pertaining to the defrauding of Visia and MDC, he denied such allegation and said that the alleged act of deceit was perpetrated by the defendant and not the plaintiff; hence it would not render the contract illegal or void but would entitle the plaintiff to withhold payment or if already paid to recover it.

It is convenient to pause here for a moment to make two observation. As stated earlier, I was doubtful whether the defendant could be allowed at this late stage to raise the aforesaid allegations to challenge what appeared to me to be a contract in writing entered into by the two parties. At that time I had in mind the provisions of s. 92 of the Evidence Act 1950 (Act 56) which prohibit the admission of oral evidence for purpose of contradicting, varying adding to or substracting from the expressed terms of a contract. I now find that I have overlooked proviso (a) of that section which reads:

> Provide that:
>
> (a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;

There is no doubt the language of the proviso that parol evidence may be given to show that a contract in writing was really made for objects forbidden either by statute or common law - see *Foster v. Driscoll* [1929] 1 KB 470 and *Kamini v. Birendra* AIR 1930 PC 100. I also observe that the plaintiff has not denied the defendant's allegations regarding the matters alleged to have been discussed and the offers or counter offers made by the plaintiff at the aforementioned two meetings. All it said is nothing more than this: even if the matters were discussed and even if the parties had reached an agreement on all or some of the matters they are irrelevant and inadmissible in view of the "finality" of the letters of offer dated 7 September 1989. It is to be noted that the plaintiff could have, without any trouble at all, requested its managing director to deny or contradict the defendant's allegations if what were said by the later were not true. As the plaintiff has failed to do so it must be held that the said allegations have been admitted by it - see *Tynte v. Buller* [1854] 23 LJ Ch 504. I would even go further and draw the inference pursuant to s. 114(g) of the Evidence Act 1950 that had its managing director affirmed an affidavit he would be in no position to deny the said allegations. Bearing this observation in mind and after a careful scrutiny of the evidence, my findings are as follows:

Both the plaintiff and the defendant agreed that the purchase price for the 50 acres of land was in the sum of RM14.157 million. They also agreed that the relevant sale and purchase agreement should not reflect the actual price, the purchase price reflected therein would be RM12 million minus RM0.2 million. The sum of RM0.2 million was meant to be a discount given for the benefit of the plaintiff. The plaintiff's legal manager had in his further affidavit admitted that the plaintiff was to give this discount. It was also agreed by the two parties that there should be a supplementary agreement to account for the remaining sum of RM2.157 million. These agreements of the two parties were subsequently reflected in the letter of offer dated 7 September 1989 relating to the 50 acres land where it was stated among other things that:

(a) the purchase price was RM11.8 million and

(b) there was or would be a supplementary agreement showing that the two parties had entered into a work contract and in consideration of the works carried by the defendant under that contract it was entitled to be paid a sum of RM2.157 million.

The arrangements of the two parties, to my mind, amount to nothing less than a dubious means of evading the Stamp Ordinance 1949 and an attempted fraud on public revenue as well as Visia and MDC. Both parties have resorted to these arrangement in order to benefit one another. In arriving at this finding I have not ignored the contention of the plaintiff that the act of deceit pertaining to the sum of RM2.157 million was an act of the defendant and it was performed for its benefit. That might well be true but it cannot be gainsaid that there was a *quid pro quo* arrangement which if carried through would profit both parties at the expense of public revenue and the two third parties. At any rate the transaction relating to the purchase of the 50 acres land at a fictitious purchase price could and was intended to commit fraud. The mention of such a fictitious price in the letter of offer of 7 September relating to the 50 acres land and purportedly accepted by the plaintiff to my mind amount to overt steps in carrying out the fraud.

The next question is whether the arrangements of the parties as adumbrated above manifesting their fraudulent conduct can render the transaction of purchase of the 50 acres land illegal or void. To answer this question it is necessary to examine the provisions of s. 24 of the Contracts Act 1950 (Act 136) which section reads as follows:

24. The consideration or object of an agreement is lawful, unless:

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

(e) the Court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

It is to be noted that under the said s. 24 the consideration or object of an agreement is lawful subject to the five circumstances specified in the said section. I think for the purpose of the present case I need only to consider the two circumstances specified in paras. (a) and (e) of that section.

It will be noticed that under para. (a) of s. 24 of the Contracts Act 1950, the only contracts that are unlawful are those forbidden by law. In the present case the relevant statute to be considered is the Stamp Ordinance 1949. It was suggested that the plaintiff had failed to comply with the statutory requirements specified in s. 5 of the Ordinance which reads:

5. All the facts and circumstances affecting the liability of any instrument to duty or the amount of the duty with which any instrument is chargeable are to be fully and truly set forth in the instrument, and the Collector may require such evidence to be furnished as may be reasonably necessary to prove that all such facts and circumstances are truly set forth.

It was therefore suggested that the non-compliance of the said section must necessarily render the letter of offer unlawful and void. But looking at the said Ordinance I think its object was not to vitiate the contract itself but only to impose a penalty, upon the party offending, for the purposes of the revenue - see s. 60 thereof. A comparable authority on this point is *Laroyd v. Braken* [1894] 1 QB 114. In that case a stockbroker who has bought or sold shares for his principal was not prevented from recovering his commission by his failure, in breach of the Stamp Act 1891, to issue a stamped contract note containing details of the transaction. In arriving at his decision Kay LJ said:

It is said that the broker did not transmit such a note to his principal in this case. The effect of his not doing so is that he is liable to a penalty of 201. Then it is said that in addition to the penalty, the bargain that the principal will pay commission is also void; but I cannot find that in the statute, and I cannot see how the penalty imposed by the statute can affect the contract between the principal and the broker. The bargain made between them need not be in writing; it may be oral; and these Stamp Acts do not affect that contract.

Another suggestion put is that there is an implied prohibition for non-compliance with the s. 5. I cannot agree with such a suggestion considering that the sole object of the Stamp Ordinance 1949 is to increase public revenue and non compliance with its provisions would at the most render the offending party to a fine but not that it should deny him access to the Courts. In *Shaw v. Groom* [1970] 2 QB 504 the landlord there was allowed to recover arrears of rent despite his failure to comply with the Landlord & Tenant Act 1962 because, as stated by Sachs LJ:

... the legislature did not by...the Act of 1962 intend to preclude the landlord from recovering any rent due or impose any forfeiture on him beyond the prescribed penalty.

I shall now proceed to consider para. (e) of s. 24 of the Contracts Act 1950. It is useful to note that the said para. (e) directs the Court to hold the consideration or object of an agreement as unlawful and void if the Court regards such consideration or object as immoral or opposed to public policy. Immoral conduct and public policy are incapable of precise definition. It has been described as "variable quality" "uncertain one" and "unruly horse". This does not, however, affect the application of the doctrine of public policy for any contract that tended to prejudice the social or economic interest of the community must be forbidden. No Court will lend its aid to a man who finds his cause of action upon unlawful act. In such a case any party to the agreement who had the unlawful intention is precluded from suing upon it - *ex turpi causa non oritur actio*. The consequence of the maxim is that the Court drives both parties from its presence - no judgment will be given and no order made as to costs. A good illustration of the maxim can be seen in the case of *Foster v. Driscoll* [1929] 1 KB 471. This case involved the forming of a partnership for the purpose of importing liquor into USA contrary to its prohibition laws. The trial Judge was of the view that since the transaction was very obscure and that the parties who had given evidence appeared uncertain as to what exactly they were intending to do, it could not be said that the agreement entered into by the parties was contrary to public policy and void. By the majority judgments of Lawrence and Sankey LJ (Scrutton LJ dissenting) the Court of Appeal reversed the order of the Court of the first instance and dismissed the actions and counterclaim without any order as to costs. The principle enunciated by Lawrence LJ appears in p. 510 of the law report:

> On principle however I am clearly of opinion that a partnership formed for the main purpose of deriving profit from the commission of a criminal offence in a foreign and friendly country is illegal; **even though the parties have not succeeded in carrying out their enterprise**, and no such criminal offence has in fact been committed; and nonetheless so because the parties may have contemplated that if they could not successfully arrange to commit the offence themselves they would instigate or aid and abet some other person to commit it. The ground upon which I rest my judgment that such a partnership is illegal is that its recognition by our Courts would furnish a just cause for complaint by the United States Government against our Government (of which the partners are subjects), and would be contrary to our obligation of international comity as now understood and recognized, and therefore would offend against our notions of public morality. (Emphasis is mine)

Adopting a similar approach Sankey LJ cited the following words of Eyre CJ (p. 521):

> The sale and delivery of goods, nay the agreement to sell and deliver goods is *prima facie* a meritorious consideration to support a contract for the price. But the man who sold arsenic to one whom he knew intended to poison his wife with it, would not be allowed to maintain an action upon his contract. The consideration of the contract in itself good, is there tainted with turpitude, which destroys the whole merit of it. I put this strong case because the principle of it will be felt and acknowledged without further discussion. Other cases where the means of transgressing a law are furnished with knowledge that they are intended to be used for that case; but the body of the colour is the same in all. No man ought to furnish another with the means of transgressing the law, knowing that he intends to make that use of them.

Another case which is relevant is the case of *Alexander v. Rayson* [1936] 1 KB 169. In that case both the lease and the agreement in question were *ex facie* legal. The plaintiff could fulfil his part towards the defendant without doing anything wrong. All that could be said was that he intended to take advantage of the peculiar form of the documents to suppress the fact of the agreement and not bringing it to the knowledge of third person, namely the Westminster Assessment Committee. By this suppression he hoped to get a reduction of the ratable value of his premises. The trial Judge was of the view that circumstance in that

case was too remote for it to be said that the lease and the agreement were illegal and he therefore rejected the defendant's plea of illegality. In reversing the decision, the Court of Appeal in an unanimous judgment said at p. 182:

> But it often happens that an agreement which in itself is not unlawful is made with the intention of one or both parties to make use of the subject matter for an unlawful purpose, that is to say a purpose which is illegal, immoral or contrary to public policy. The most common instance of this is an agreement for the sale or letting of an object, where the agreement is unobjectionable on the face of it, but where the intention of both or one of the parties is that the object shall be used by the purchaser or hirer for an unlawful purpose. In such a case any party to the agreement who had the unlawful intention in precluded from suing upon it. *Ex turpi causa non oritur actio*. The action does not lie because the Court will not lend its help to such a plaintiff.

In answer to the contention of the plaintiff's Counsel that the law would allow the plaintiff a *locus poenitential*, the Court of Appeal said (p. 190):

> So, perhaps, it would have done, had the plaintiff repented before attempting to carry his fraud into effect: see *Taylor v Bowers*. (2) But, as it is, the plaintiff's repentance came too late - namely, after he had been found out. Where the illegal purpose has been wholly or partially effected the law allows no *locus poenitentiae*: see *Salmond and Windfield's Law of Contract*, p. 152. It will not be any the readier to do so when the repentance, as in the present case, is merely due to the frustration by others of the plaintiff's fraudulent purpose.

Two general principles relating to illegal contract have been laid down by Devlin J in *St John Shipping Corporation v. Joseph Rank Ltd.* [1957] 1 QB 267 (p. 283):

> The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends upon proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it.

and

> The second principle is that the Court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not.

The distinction between these two classes of contracts is stated in these words:

> A significant distinction between the two classes is this. In the former class you have only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the later class, you have to consider not what acts the statute prohibits, but what contracts it prohibits; but you are not concerned at all with the intent of the parties; if the parties enter into a prohibited contract, that contract is unenforceable.

The principles enunciated in that case were reiterated by Devlin LJ in *Archbolds (Freightage) Ltd. v. S. Spanglett Ltd., Randall (Third Party)* [1961] 1 QB 375.

In *Miller v. Karlinski* [1945] 62 TLR 85 the English Court Appeal dealt with a contract which was constituted to defraud the revenue. Du Parcy LJ held that such a contract is illegal on being contrary to public policy.

The High Court of Australia, in dealing with the question of illegal contracts adopts an approach similar to that of the English Courts. Thus in *Yango Pastoral Company Pty. Ltd. v. First Chicago Australia Ltd.* [1978] 139 CLR 410, Gibbs ACJ sets out the four main ways in which the enforceability of a contract may be affected by statutory provision which renders particular conduct unlawful (p. 413):

> (1) The contract may be to do something which the statute forbids; (2) The contract may be one which the statute expressly or impliedly prohibits; (3) the contract, although lawful on its face, may be made in order to effect a purpose which the statute renders unlawful; or (4) The contract, although lawful according to its own terms, may be performed in a manner which the statute prohibits.

Mason J in the same case gave a concise summary of the principle of *ex turpi causa* (p. 429):

> It may be that the true basis of the principle is that the Court will refuse to enforce a transaction with a fraudulent or immoral purpose: *Beresford v. Royal Insurance Co. Ltd.* (72). On this basis the common law principle of *ex turpi causa* can be given an operation consistent with, though subordinate to, the statutory intention, denying relief in those cases where a plaintiff may otherwise evade the real consequences of a breach of a statutory prohibition.

The distinction, advocated by Devlin LJ, between a contract prohibited by law and a contract which though not so prohibited, was entered into with the object of committing an unlawful act was reiterated by Jacob J in the same (p. 432):

> In other cases the prohibition against carrying on a business may not be able to be construed as either an express or implied prohibition against the making of a particular contract. Nevertheless in such a case the Courts may not enforce such a contract but, if they do not, it is not because the contract itself it directly contrary to the provisions of the statute by reason of an express or implied prohibition in the statute itself but because it is a contract associated with or in the furtherance of illegal purposes, for instance, the purposes of a business being carried on illegally: *McCarthy Bros. Pty. Ltd. v. Dairy Farmers Co-operative Milk Co. Ltd.* [1945] 45 SR (NSW) 266.

In yet another case of *North & Ors. v. Marra Development Ltd.* [1981] 37 ALR 341, the High Court of Australia held that the appellants who were stockbrokers, could not recover the remuneration for their services not because the agreement on which they sued was avoided by s. 70 of the Securities Industry Act 1970 (NSW) but because the performance on which the appellants relied involved illegal conduct of artificial manipulation of the market price of the respondents' shares.

The Supreme Court of India is equally emphatic in refusing its aid to a party who deliberately makes use of a contract to circumvent the law. Thus in *Firm Patachand v. Firm, Kotrike* AIR 1975 SC 1223, Beg J said (p. 1228):

> If an agreement is merely collateral to another or constitutes an aid facilitating the carrying out of the object of the other agreement which though void, is not in itself prohibited within the meaning of s. 23 of the Contract Act, it may be enforced as a collateral agreement. If on the other hand, it is part of a mechanism meant to defeat what the law has actually prohibited, the Courts will not countenance a claim based upon the agreement because it will be tainted with an illegality of the object sought to be achieved which is hit by s. 23 of the Contract Act. It is well established that the object of an agreement cannot be said to be forbidden or unlawful merely because the agreement results in what is known as "void contract". A void agreement, when coupled with other facts, may become part of a transaction which creates legal rights, but this is not so if the object is prohibited or "*mala in se*".

The Singapore Court of Appeal likewise holds the view that when a party entered into a contract with the object of breaching the revenue law, the Court will not assist him. Thus in *Patriot Pte. Ltd. v. Lam Hong Commercial Co.* [1980] 1 MLJ 135, Wee Chong Jin CJ said (p. 137):

> It has been settled law since *Foster v. Driscoll* that if a party to a contract actively engages in an illegal adventure to get goods into a country in breach of the revenue laws of that country, the Court will not assist the parties to the adventure by entertaining or settling any dispute between the parties arising out of the contract.

Turning to the local cases, the Privy Council, has in *Palaniappa Chettiar v. Arunasalam Chettiar* [1962] AC 294 applied the principle enunciated by Lord Mansfield that "No Court will lend its aid to man who found his cause of action upon an immoral or illegal act". In *Tan Bing Hock v. Abu Samah*, Raja Azlan Shah J (as he then was) held a similar view (p. 150):

> In the present case the defendant is not the party who seeks to enforce the illegal contract. If he were the plaintiff he would be in the same position as in the *Chettiars'* case. He comes to Court as a defendant, and my understanding of the law is that it is within the province of a defendant to set up the defence of illegally. If the law is otherwise, the result would be calamitous. It would mean that the Court, contrary to precedents, will lend its aid to enforce an illegal act.

Transposing the principles laid down in the aforementioned authorities to the present case, I must say in preface that although there are numerous instances of illegal contracts to be found in the law reports I have been unable to find any case in which the facts are similar to the facts of the present case. However that may be, as the real nature of the transaction for the sale of the 50 acres land is as I have described it, I do not gather that it could be disputed that the document purporting to define the rights and obligation of the parties namely the letter of offer of 7 September 1989 relating to the sale and purchase of the 50 acres land is unlawful and void on the ground that the consideration or object of the agreement manifested by the said letter of offer is immoral or opposed to public policy pursuant to s. 24 of the Contracts Act 1950. On principle I am of the opinion that such an agreement formed for the purpose of evading the Stamp Ordinance 1949 and attempting fraud against the revenue and two third parties and deriving profits therefrom is certainly illegal. In arriving at this conclusion I have not overlooked the fact that there is no evidence to show that the parties have actually carried out the frauds. But the said letter of offer in the present case is by itself dangerous in the sense that it could be and was intended to be used for a fraudulent purpose. Furthermore in accepting the false purchase price mentioned in the said letter of offer and applying to this Court for specific performance of the agreement the plaintiff has taken an overt step in carrying out the frauds. In any case uncertainly of the parties defrauding the revenue and the two third parties do not go to the root of the illegality but only has reference to the method by which the fraudulent object of the parties is to be achieved.

Counsel for the plaintiff submitted that the issue of illegality should not be entertained at this stage when the plaintiff was only asking for a temporary injunction. The issue could only be settled at the trial of the substantive case. With due respect I cannot agree. It is true that one of the legal principles relating to the grant of a temporary injunction as laid down in the leading case of *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396 is that all that the Court is to decide at the threshold stage is that on the face of it the person applying for an injunction has a case which needs consideration and which is not bound to fail by virtue of some apparent defects. It would be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged and that matters

should be preserved in *status quo* until the final disposal of the question. However, where on the facts there is nothing which gives the plaintiff any right at all the injunction sought should be refused - see *Government of Pakistan v. Seng Peng Sawmill Sdn. Bhd.* [1979] 1 MLJ 219.

For the reasons as stated above the injunction insofar as it affects the 50 acres land held under the title HS (D) 20945 PT 8541 and all transactions and contract entered or to be entered into by the defendant with any persons must therefore be revoked.

The matter does not end here for there are still the two agreements relating to the two pieces of land held under the titles HS (D) 23030 PT 11695 and HS (D) 23028 PT 11693 respectively. The defendant mounted a two-fold attack against these agreements.

(i) the purported agreement was made subject to formal contract to be drawn up later, and since no such contract was made the agreement could not bind the parties; and

(ii) the parties had agreed that any sale to the plaintiff would be a block sale of all the three pieces of land. Since the agreement for the purchase of the 50 acres land was tainted with illegality the agreements for the purchases of the two smaller lands was likewise tainted with illegality.

With regard to the first contention, it was suggested that on 28 August 1989 the plaintiff had written to the agent of the defendant offering to purchase *inter alia* the said two pieces of land and in that letter it had set out its terms and thereafter it said "subject to signing of formal contract". (See Exhibit "MD4" annexed to encl. 10). That being the case it was therefore argued that the use of the formula "subject to contract" as a condition of their arrangements would preclude the assumption by the parties of contractual obligations. On this point I think it is advisable for me to follow the guidance of the Privy Council in the case of *Daiman Development Sdn. Bhd. v. Matthew Lui Chin Teck & Anor.* [1981] 1 MLJ 56 where it was said at p. 58:

> The question whether parties have entered into contractual relationships with each other essentially depends upon the proper understanding of the expressions they have employed in communicating with each other considered against the background of the circumstances in which they have been negotiating, including in those circumstances the provisions of any applicable law. Where they have expressed themselves in writing the proper construction of the writing against that background will answer the question. The purpose of the construction is to determine whether the parties intend presently to be bound to each other or whether, no matter how complete their arrangements might appear to be, they do not so intend until the occurrence of some further event, including the signature of some further document or the making of further arrangement. The question is one as to expressed intention and is not to be answered by the presence or absence of any particular form of words. But, in general, employment of the formula "subject to contract" as a condition of their arrangement will preclude the present assumption by the parties of contractual obligations.

Applying the principles laid down in that case to the present case, I do not think it can be said with any degree of certainty that the parties here did not conclude a binding contract. The letter of the plaintiff dated 28 August 1989 had set out all the essential terms of the agreements, there is nothing in that letter to show that it was the intention of the parties not to make concluded bargain at all, unless and until they executed a formal contract. True the plaintiff had used the words "subject to signing of formal contract" in that letter but I have no doubt at all that the plaintiff had reached finality in arranging all the terms of its bargain intended that the parties would be immediately bound to the performance of those terms. In using the formula "subject to signing of a formal contract", it merely proposed to have the

terms restated in a form which would be fuller and more precise but not different in form. As the defendant had accepted the terms it too must have intended to conclude binding agreements in respect of the sales purchases of the two smaller lands. The intention of the parties in any case was clearly manifested in the two subsequent letters of offers of 7 September 1989. All the terms contained in the letter of the plaintiff dated 28 August 1989, with some insignificant changes, imported into the said letters of offer and what is more important is that the formula "subject to signing of a formal contract" was not put in the said letters of offer. Bearing in mind that the plaintiff's letter of 28 August 1989 was tendered at the negotiation stage and thereafter the agreements of the parties were manifested by the said letters of agreement which did not contain the said formula, it is to my mind a fallacy to suggest that the parties did not intend to make any concluded bargains. In any event the plaintiff has strenuously disputed the defendant's contention and I am satisfied that the former has shown to this Court that this is a serious question that can only be dissolved at the trial of the substantive matter.

As to the second contention, the defendant was relying on passage from the letter written by the agent of the defendant on 6 September 1989 (Exhibit "MD5" annexed to encl. 10) which reads:

> From what we could gather outside of the above mentioned discussions at the Lion Group office they are keen to acquire all the three parcels of land; priority is given to the 14.45 acres. We informed them that if they are keen on the 14.45 acres, to make a deal with Ingeback, they have to acquire the 50 acre land at the same time to which they have agreed. Taking into account the development that has transpired so far, we are of the opinion that should they be unsuccessful in securing the 14.55 acres, they may call off the deal on the 50 acres.

I cannot see how that passage can be construed as indicative of a block sale of the three pieces of land. From that passage it is clear to me that the plaintiff was at the material time keen to buy only 14.55 acres which I take it to include the two smaller lands in question and not the 50 acres. It was the defendant who asked it to buy the 50 acres land as well to which it agreed. There was no suggestion anywhere to show that should the purchase of the 50 acres land fall through the deal relating to the 14.55 acres land would also be at an end. The sale and purchase of the 50 acres land was not made a condition of the sales and purchases of the two smaller lands.

If I am found to be wrong in my construction of the aforementioned passage it is to be noted that the three pieces of land were offered for sale by three separate letters of offer of the same date. The plaintiff had accepted each of the offer and there as no mention in any of the said letters of offer of a block sale of the three pieces of land. In any event if it had been a block sale I am of the view that as the agreements relating to the two smaller pieces of land are not founded on or sprang from an illegal transaction they cannot be said to be illegal and void. It would be singular if the law were otherwise. It would mean that the Court, contrary to all precedents, will lend its aid to a guilty party to get rid of agreement entered into by them which are completely untainted with any illegality.

One final point which I have to decide relates to the principle of balance of convenience as enunciated in the *American Cyanamid* case (*supra*). I agree with the Counsel for the plaintiff that as the claim of the plaintiff is for specific performance of the two agreements of sales and purchases of the two pieces of land at a price totalling RM5.6 million which apparently the plaintiff intended to develop, it would not be sufficiently compensated by purely monetary compensation. Indeed there is a term in the said agreements that:

If the vendor fails or refuses to complete transaction after the purchaser has tendered full payments; the purchaser may sue for specific performance **and the parties agree that monetary compensation to the purchaser is insufficient compensation.** (Emphasis is mine)

Furthermore there is no suggestion that the plaintiff would not be able to compensate the defendant for any damages suffered by the latter.

For the above reasons, I think the proper order to make is this:

(i) the temporary injunction granted by this Court on 6 October 1989 shall have no effect in respect of the land held under title HS (D) 20945 PT 8542 Mukim of Kapar District of Klang.

(ii) the temporary injunction granted by this Court on 6 October 1989 shall continue to have effect on the lands held under titles HS (D) 23030 PT 11695 and HS (D) 20945 PT 8451 both in the Mukim of Kapar District of Klang until disposal of this suit with liberty to the defendant to apply to vary the said injunction.

The plaintiff's undertaking regarding damages will still apply.

Also found at [1990] 1 CLJ 750